Public Prosecutor v Liakat Ali bin Baddar Din and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–323 OF 2010 AND B-05–467 OF 2010
AZAHAR MOHAMED, BALIA YUSOF AND MOHAMAD ARIFF JJCA
23 JANUARY 2013

Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Accused told policeman after being cautioned that cannabis was kept in boot of car — Whether accused's statement and act of showing policeman where cannabis was kept showed he had knowledge of drugs — Whether car was exclusively under accused's control custody and responsibility

The respondent ('accused') was charged in the High Court on two counts of trafficking in cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). He was acquitted of the first charge of trafficking in 269.66g of the drug found in a flat he rented with two others but was convicted and sentenced to death on the second charge of trafficking in 1,797g cannabis found in the boot of a taxi he drove. Both charges were jointly tried. The accused's acquittal on the first charge was made at the end of the prosecution's case whilst the conviction on the second charge was after the court had heard his defence. The prosecution appealed to the Court of Appeal against the acquittal while the accused appealed against the conviction and sentence. It was the prosecution's evidence that a ten member police party carrying out an operation found the accused sitting in the driver's seat of a taxi parked by a roadside with the engine running. A member of the party ('PW5') identified himself to the accused as a police officer and after administering him a verbal caution under s 37A(1)(b) of the DDA, asked the accused whether he kept any 'barang salah' in the taxi. The accused replied that he had kept ganja in the boot. With the accused's assistance, the police officers checked the boot of the taxi and found the cannabis in the spare-tyre compartment. The accused then led the police party to his apartment nearby where more cannabis was found in one of the rooms. The flat was rented jointly by the accused and two others and although the drugs were found in a room which was supposedly used by the accused, the evidence showed the room was used more as a store and was accessible to all the flat's occupants and their friends. In his defence, the accused denied knowledge about the drugs in the boot of the taxi. The trial court ruled that the accused's statement to PW5 that he had kept ganja in the boot of the taxi was admissible in evidence under s 37A(1)(b) of the DDA as all the pre requisites for its admissibility had been fulfilled.

Held, dismissing both appeals and affirming the decisions of the High Court:

(1) On the facts, the trial judge was correct to find the prosecution had failed

to prove possession of the cannabis by the accused on the first charge given that he did not have custody or control of the drugs found in the room and that he did not have exclusive power to deal with the drugs to the exclusion of others (see para 10).

(2) The prosecution's evidence showed the taxi was under the accused's hire and he had complete custody, control and responsibility over the vehicle (see paras 15 & 17).

(3) There was more than sufficient admissible evidence to support the trial judge's finding that the accused spontaneously and voluntarily replied to PW5 and then showed PW5 where the cannabis was kept in the boot of the taxi. That being so, the trial judge was entitled to infer the appellant had the required knowledge about the cannabis found in the boot. There was no misdirection by the trial judge on this finding of fact (see para 21).

[Bahasa Malaysia summary

Responden ('tertuduh') didakwa di Mahkamah Tinggi atas dua kesalahan pengedaran kanabis di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dia dilepaskan daripada tuduhan pertama pengedaran sebanyak 269.66g dadah yang diperolehi di flat yang disewa bersama dua yang lain tetapi disabitkan dan dihukum mati atas tuduhan kedua pengedaran kanabis sebanyak 1,797g dijumpai di dalam but teksi yang dipandunya. Kedua-dua tuduhan dibicarakan bersama. Pelepasan tertuduh atas tuduhan pertama dibuat di akhir kes pendakwaan sementara sabitan ke atas tuduhan kedua adalah selepas mahkamah mendengar pembelaannya. Pendakwaan merayu kepada Mahkamah Rayuan terhadap pelepasan tersebut sementara tertuduh merayu terhadap sabitan dan hukuman. Adalah keterangan pendakwaan bahawa sepuluh ahli pasukan polis yang menjalankan operasi mendapati tertuduh duduk di tempat duduk pemandu yang diparkir di tepi jalan dengan enjin tidak dimatikan. Seorang ahli pasukan tersebut ('PW5') memperkenalkan dirinya kepada tertuduh sebagai pegawai polis dan selepas membuat amaran lisan kepadanya di bawah s 37A(1)(b) ADB, bertanya kepada tertuduh sama ada dia menyimpan apa-apa 'barang salah' di dalam teksi. Tertuduh menjawab bahawa dia menyimpan ganja di dalam but. Dengan bantuan tertuduh, pegawai-pegawai polis memeriksa but teksi dan menjumpai kanabis di dalam tempat letak tayar ganti. Tertuduh membawa pasukan polis ke flatnya yang berdekatan di mana banyak lagi kanabis dijumpai di dalam salah satu bilik-bilik tersebut. Flat tersebut disewa bersama oleh tertuduh dan dua orang lagi dan walaupun dadah dijumpai di dalam bilik yang kononnya digunakan oleh tertuduh, keterangan menunjukkan bilik tersebut lebih digunakan sebagai stor dan boleh diakses oleh semua penghuni flat dan kawan-kawan mereka. Dalam pembelaannya, tertuduh menafikan pengetahuan mengenai dadah di dalam but teksi. Mahkamah perbicaraan memutuskan bahawa penyataan tertuduh kepada PW5 yang dia menyimpan ganja di dalam but adalah keterangan boleh diterima di bawah s 37A(1)(b)

ADB memandangkan kesemua pra-syarat bagi kebolehterimaan telah dipenuhi.

Diputuskan, menolak kedua-dua rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Atas fakta, hakim perbicaraan adalah betul apabila mendapati pendakwaan telah gagal untuk membuktikan milikan kanabis oleh tertuduh ke atas tuduhan pertama memandangkan dia tidak mempunyai jagaan atau kawalan terhadap dadah yang dijumpai di dalam bilik dan bahawa dia tidak mempunyai kuasa eksklusif untuk berurusan dengan dadah hingga pengecualian yang lain (lihat perenggan 10).

(2) Keterangan pendakwaan menunjukkan teksi di bawah penyewaan tertuduh dan dia mempunyai jagaan penuh, kawalan dan tanggungjawab ke atas kenderaan tersebut (lihat perenggan 15 & 17).

(3) Terdapat keterangan boleh terima yang mencukupi untuk menyokong dapatan hakim perbicaraan bahawa tertuduh secara spontan dan sukarela menjawab PW5 dan kemudiannya menunjukkan kepada PW5 di mana kanabis disimpan di dalam but teksi tersebut. Oleh itu, hakim perbicaraan berhak untuk menyatakan perayu mempunyai pengetahuan yang dikehendaki mengenai kanabis yang dijumpai di dalam but. Tidak terdapat salah arah oleh hakim perbicaraan atas dapatan fakta ini (lihat perenggan 21).]

Notes

For cases on traficking in dangerous drugs, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 301–302.

Cases referred to

Mat v PP [1963] MLJ 263 (folld)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (folld)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Denishl Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2008] 5 CLJ 186, FC (folld)

Legislation referred to

Criminal Procedure Code s 180(2)
Dangerous Drugs Act 1952 ss 2, 37(d), (da), 37A(1), (1)(b), 37B(1)(a), 39B(1)(a), First Schedule
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial Nos 45–30 of 2005 and 45–47 of 2005 (High Court, Shah Alam)

Jagdish Kaur (Bernad Lewis with him) (Noor Bernard Partnership) for the appellant.
Tetralina Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] In the High Court, Liakat Ali bin Baddar Din ('the appellant') was charged and tried for two counts of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') as follows:

> First Charge (Case No 45–30 of 2005)
>
> Bahawa kamu pada 9 Jun 2004 jam lebih kurang 6.15 petang di alamat G-8-16, Pangsapuri Puchong Permata 2, Puchong di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya sejumlah berat 269.66 gram Cannabis dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama
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> Second Charge (Case No 45–47 of 2005)
>
> Bahawa kamu pada 9 Jun 2004 jam lebih kurang 6.00 petang di tepi Jalan Puchong Permata Satu, Pangsapuri Puchong, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya sejumlah berat 1797 gram Cannabis dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] Both the charges were tried together at one trial before the learned judicial commissioner ('JC') in the High Court at Shah Alam. At the end of case for the prosecution, the learned JC found that the prosecution had not made out a prima facie case on the first charge and accordingly, pursuant to s 180(2) of the Criminal Procedure Code acquitted the appellant without calling for the appellant to enter on his defence. The public prosecutor ('PP') appealed to this court against the order of acquittal (Criminal Appeal No B-05–323 of 2010). In respect of the second charge, the learned JC held that a prima facie case had been made out against the appellant. The learned JC then called upon the appellant to enter his defence. The learned JC at the conclusion of the trial convicted the appellant on the second charge and sentenced him to the mandatory death penalty prescribed by the DDA.

Aggrieved by that decision, the appellant then appealed to this court (Criminal Appeal No B-05–467 of 2010).

[3] We heard both the appeals together, wherein at the conclusion we

unanimously dismissed the appeal by the PP in Criminal Appeal No B-05–323 of 2010. We also unanimously dismissed the appellant's appeal in Criminal Appeal No B-05–467 of 2010. We affirmed the conviction and sentence. We now give our reasons for so deciding.

[4] The facts adduced by the prosecution at the trial in the High Court had been fully and well set out in the judgment of the learned JC (see pp 361–369 of Vol 4 of the appeal record). Here, we will only highlight in the following paragraphs, very briefly, the pertinent facts in so far as they are relevant to the issues which arise for decision in this appeal before us.

[5] On 9 June 2004, ASP Chia Aik Chin ('PW10') and C/Insp Mohd Husni bin Manaf ('PW5') and eight other police officers conducted an operation in the Puchong area. During the operation, the police team detained a black Proton Iswara taxi bearing registration No HWB 7874, which was then parked by the side of the road at Jalan Permata Satu, Puchong. The appellant was then sitting in the driver's seat in the taxi. At the material time, the engine of the taxi was running. PW5 identified himself as a police officer to the appellant and opened the driver's door of the taxi. He switched off the engine of the taxi and seized the taxi keys. The appellant was then asked to step out. PW5 then administered a verbal caution to the appellant under s 37A(1)(b) of the DDA. After cautioning the appellant, PW5 asked the appellant whether he was keeping any 'barang salah' in the taxi. The appellant replied that he had kept ganja in the boot of the taxi. Upon being shown by the appellant, and witnessed by other members of the police team, PW5 examined the boot of the taxi and found a black plastic bag (P20) containing two compressed slabs of dried leaves suspected to be ganja, which PW5 marked as A1 and A2 (P21A and P22A), in the spare tyre compartment. PW5 stated that when the boot was opened, the black plastic bag could not be seen since it was covered by a board. PW5 and his team did not find anything else in the taxi. PW5 further stated that A1 was wrapped in a clear plastic sheet and tied with a green rafia string; A2 was wrapped in an aluminium foil. The compressed slabs formed the subject matter of the second charge. The chemist, Maimonah bt Sulaiman ('PW3'), confirmed that the compressed slabs were cannabis weighing 1,797g as defined in s 2 of the DDA and as is listed in the First Schedule to the Act.

[6] Afterward, the appellant brought PW5 and the police team to his apartment, at Permata 2 Apartments in Puchong, infront of Permata 1 where the appellant had earlier been arrested by the roadside. PW5 used one of the keys, from the same bunch of the taxi keys, to open the padlock for the grill of the appellant's apartment. After that, PW5 could open the wooden door which was closed but not locked. Upon being shown by the appellant, PW5 and his team entered the apartment. They searched the appellant's room and found (a) one plastic container with an orange cover with the words, MUNCHY'S.

Inside, it contained a plastic bag with the words, BETTAS. Inside the plastic bag were two compressed slabs of dried leaves suspected to be ganja; and (b) one plastic container with a blue cover. Inside, it contained one compressed slab of dried leaves and some loose dried leaves, all suspected to be ganja. The compressed slabs of dried leaves formed the subject matter of the first charge. PW3 confirmed that the compressed slabs of dried leaves were cannabis weighing 269.66g.

[7] In his defence, the appellant stated that he started work as a lorry attendant for one Jaspal Singh a/l Hakam Singh ('DW2') for about two months before his arrest on 9 June 2004. The appellant stated that at no time did he sign the agreement with Metro Impresif in order to hire the taxi from one Sayid. He explained that he first got to know Sayid when they were both working at Zalik Securities Sdn Bhd in the 1990's. The appellant stated that Sayid informed him that he ('Sayid') had tuberculosis and diabetes. As a result of his ill health, Sayid could not drive the taxi. Sayid then asked the appellant to help him by renting out the taxi, or by looking for a buyer for the taxi. Whenever any person wanted to rent the taxi, the person would contact Sayid and Sayid would then ask the person to see the appellant. The taxi was usually parked by the appellant at the car park at the aparment in Puchong.

[8] The appellant stated that the persons who rented the taxi would usually rent it for at least two or three days. At the time when the person returned the taxi, the appellant would only check the outside of the taxi, just to make sure that there were no accidents. The appellant did not check the inside of the taxi or the boot. According to the appellant, the persons who frequently rented the taxi were Din, Lan, Yusof and Azahar.

[9] According to the appellant, on the day of his arrest, he had just returned from Terengganu to Puchong at about 2–3pm. He received a telephone call at about 4pm from Din who wanted to rent the taxi. He told Din that he could collect the taxi at 6pm that day. The appellant was very tired after his trip to Terengganu. So he rested first and then went out driving the taxi at 5.30pm in order to get a drink, and also to wait for Din. While waiting at his house in the taxi for Din, suddenly about seven or eight police officers, including PW5, raided the taxi. They opened the taxi door, switched off the engine, pulled out the key and asked the appellant to get out of the taxi. According to the appellant, they then handcuffed his hands at the back and made him squat near the front tyre of the taxi. PW5 and his men went to examine the boot of the taxi. It is the story of the appellant that suddenly PW5 showed him a black plastic bag and its contents of two compressed slabs and asked who they belonged to. According to the appellant he replied that he did not know. The core of the appellant's defence was that he had no knowledge at all about the dangerous drugs found in the boot of the taxi in the spare tyre compartment.

[10] With regard to the PP's appeal in Criminal Appeal No B-05–323 of 2010, we agree with the findings of the learned JC that the appellant did not have custody or control of the dangerous drugs found in his room. Noorkemi bin Ahmad ('PW9') testified that he rented the apartment together with the appellant and one Zailan. It is true that the drugs in question were found in the room rented by the appellant. In this regard, it is important to note that the appellant's room had no lock. But that is not all. The evidence adduced during the case for the prosecution revealed that PW9 and his friends could go in and out of the appellant's room as and when they like. PW9 said that his friends often stayed overnight at the apartment. PW9 further stated that the appellant's room was utilised almost as a store room rather than a bedroom. PW9 said the appellant's room had too many things inside for one to sleep in. PW10 also confirmed that the appellant's room was in a mess, with things scattered all over the place. According to PW9 the appellant hardly slept in the room. Instead the appellant preferred to sleep outside the room. PW9 also confirmed that the appellant usually went back to his own house in Bandar Tasik Permaisuri to see his wife. It is an established principle of law that in order to prove the element of possession, it must be proved that one has the exclusive power to deal with the drugs (see *Public Prosecutor v Denishl Madhavan* [2009] 3 MLJ 46; [2009] 2 CLJ 209). In our judgment, on the facts of the present case, the learned JC was entitled to and correct in finding that the prosecution had failed to prove possession of the cannabis by the appellant given that the appellant did not have custody or control of the dangerous drugs found in his room and that he did not have exclusive power to deal with the dangerous drugs, to the exclusion of others. For that reason the learned JC was correct in arriving at the finding that the prosecution had not made out a prima facie case against the appellant on the second charge. We therefore dismissed the public prosecutor's appeal.

[11] We turn next to the appellant's appeal in Criminal Appeal No B-05–467 of 2010. As we have indicated earlier, the drugs in question were found in the boot of the taxi in the spare tyre compartment. When this appeal came before us, the appellant raised five principal grounds in support of his appeal. We shall deal with each of them in turn.

[12] The first relates to the issue of double presumption. Learned counsel submitted that the learned JC had erred in law when she used the presumption of possession under s 37(d) of the DDA to invoke the presumption of trafficking under s 37(da). Learned counsel then brought to our attention the following passage of the judgment of the learned JC:

> Even if I were to hold that thepProsecution failed to prove the accused's knowledge of the dangerous drugs (which I do not) the prosecution is allowed to rely on the presumption in s 37(d) of the Act to prove knowledge.

[13] We saw no merit in this submission. That passage of the learned JC's judgment must be read in its proper context. It is important to bear in mind that later in her judgment, the learned JC said the following:

> However, since the prosecution is allowed to invoke the presumption in s 37(d) of the Act to prove possession, the prosecution is therefore no longer at liberty to invoke a second, or a double presumption, namely, the presumption in s 37(da)(vi) of the Act, to prove trafficking (see Federal Court case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 1 AMR 829), *Public Prosecutor v Abdul Manaf bin Muhammad Hassan* [2006] 3 MLJ 193; [2006] 3 AMR 89 and also *Public Prosecutor v Sanqgaram a/l Sugumaran* [2010] 3 AMR 60).
>
> The prosecution is now required to prove the element of trafficking by other affirmative evidence without the aid of the presumption in s 37(da)(vi) of the Act

[14] In our judgment the learned JC is entitled to and correct in stating that the prosecution may rely on the presumption under s 37(d) of the DDA to prove possession and seek to prove by affirmative evidence (independent of the presumption under s 37(da) of the DDA) that the appellant was in fact trafficking in the dangerous drug.

[15] We turn next to the second ground raised by learned counsel for the appellant, that is, pertaining to the issue of control and custody of the taxi. It was argued that the taxi was leased by Metro Impresif vide the agreement in P47 to Sayid for 42 months commencing from 21 January 2004 and that the agreement had not been revoked. Learned counsel submitted that the taxi did not belong to the appellant and there was no signed agreement between the appellant and Metro Impresif for the hire of the taxi. Learned counsel argued that it was not improbable that Sayid may have placed the drugs in the boot of the taxi. We were unable to agree with this submission. In the first place, the issue of ownership of the taxi or hiring vide a signed agreement is irrelevant. The crucial issue is whether the appellant had custody of the car and was fully responsible for the taxi at the time when the dangerous drugs were found by the police. In relation to this, the learned JC, after carefully reviewing the evidence, made specific findings concerning this issue as follows:

> From SP7's evidence, it is clear that after 20 April 2004, after the payments made by the accused for Sayid's arrears of rent for hiring the taxi, and for the accused's own hire and use of the taxi, the accused was fully responsible for the taxi (see P51D, P51A–D, P46, P51E–G).

[16] In our judgment, the above finding was correctly made upon a consideration of the circumstances and the factual matrix of the case.

[17] Turning now to the third ground, it was argued by learned counsel that the failure of the prosecution to either call, or at least make available Sayid to

the defence, amounts to willful suppression of evidence and thereby s 114(g) of the Evidence Act 1950 should be invoked against the prosecution. It is true that the prosecution did not call Sayid as a witness. However, evidence led by the prosecution disclosed that the appellant completely took over the taxi after 20 April 2004 by hiring it from Metro Impresif. At the time when the dangerous drugs were found, Sayid did not have custody, control or possession of the taxi. After taking over Sayid's place, the appellant had complete custody or control of the taxi. Viewed in this way, Sayid was not a witness essential to unfolding the narrative of the prosecution case to establish proof against the appellant beyond all reasonable doubt. Therefore, the absence of Sayid did not prejudice the prosecution's case. Sayid was not an important witness and was not needed to prove the prosecution's case. For this reason, the learned JC was not wrong when she held that s 114(g) of the Evidence Act 1950 cannot be invoked against the prosecution since Sayid cannot be traced. The failure of the prosecution to call Sayid to testify cannot be categorised as withholding or suppression of evidence.

[18] This brings us to the fourth ground. It was strenuously argued by learned counsel that the learned JC erred in finding that the appellant had the prerequisite knowledge about the dangerous drugs found in the boot of the taxi in the spare tyre compartment. Learned counsel argued that the drugs were in a concealed place under the board and not visible to anyone, unless one opens the boot and lifts the board. It was contended that Sayid had possession of the taxi longer than the appellant and that it was more likely that he had ample time to place the drugs in the spare tyre compartment. On this issue, the authority that we would like to refer is the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337. Arifin Zakaria FCJ (as His Lordship then was) in delivering the judgment of the Federal Court said:

> Therefore, the presence of the three package in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained things of similar nature (see also *Lim Beng Soon v Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge.

Further down in the judgment, His Lordship said:

> … While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible.

[19] In considering this appeal, we had closely scrutinised the judgment of the learned JC. A reading of the judgment revealed that the learned JC had considered and judicially appreciated the issue at some length before coming to a definite finding of fact that the appellant had the knowledge about the dangerous drugs found in the boot of the taxi. In this regard, PW5 testified that he did administer to the appellant a verbal caution under s 37A(1)(b) of the DDA. The material part of the evidence of PW5 is as follows:

> Setelah membuka pintu di bahagian pemandu, saya telah merampas kunci tersebut setelah mematikan enjinnya. Saya telah menahan lelaki itu dan minta dia keluar dan teksi itu. Saya ada beri amaran kepada lelaki itu secara lisan. Amaran itu di bawah seksyen 37A(1)(b) Akta Dadah Berbahaya 1952.
>
> Dengan dipandukan oleh suspek, dan disaksikan oleh polis, saya telah membuat pemeriksaan di bahagian bonet belakang teksi tersebut, melalui pembuka atau lever di bahagian depan, telah menjumpai satu beg plastik warna hitam yang mengandungi 2 ketul mampat daun kering disyaki ganja. Bila buka bonet belakang, barang kes berada di tempat tayar spare. Bila buka, tidak nampak, tetapi apabila buka papan, baru boleh nampak. Barang kes itu memang tersorok; apabila buka bonet, tidak boleh nampak.

[20] PW10 corroborated the evidence of PW5 regarding this aspect of the evidence adduced by the prosecution. PW10 further stated in his evidence that when the appellant was asked whether he was keeping any 'barang salah' in the taxi, the appellant replied that he had kept ganja in the boot of the taxi. This then brings into focus the following question: whether the appellant's statement to the effect that he was keeping ganja in the taxi is admissible as a statement or confession under s 37A(1)(b) of the DDA. The learned JC was very much alive to this issue. After evaluating the evidence, the learned JC came to a finding that the appellant's statement is admissible under s 37A(1) of the DDA as evidence for the reasons that the appellant's statement was orally made; the appellant's oral statement was made to PW5, a chief inspector, who is therefore above the rank of inspector; the appellant made the statement after he was given the oral caution by PW5 under s 37A(1)(b) of the DDA; and there is no evidence that the appellant made the statement after any inducement, threat or promise having reference to the charge against him proceeding from PW5, PW10 or the other police officers in the team, and which is sufficient to give the appellant grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature with reference to the proceeding against him.

[21] In our judgment, the issue of the admissibility of the appellant's statement under s 37A(1)(b) of the DDA was decided wholly on the facts and the prevailing circumstances of the case, based on the credibility of the witnesses and the inherent probabilities of their testimonies. In our judgment, on consideration of the evidence and the material available on record of appeal,

there was more than sufficient admissible evidence to support the learned JC's findings that the appellant spontaneously and voluntarily replied to PW5 and then showed PW5 where the ganja were kept in the boot of the taxi. That being so, from the circumstances of the case, the learned JC was entitled to infer that the appellant had the required knowledge about the dangerous drugs found in the boot of the taxi in the spare tyre compartment. We are of the view that there has been no misdirection by the learned JC on this finding of fact.

[22] Finally, we now turn to consider the appellant's contention that his defence was not adequately considered by the learned JC. We found the complaint of learned counsel lacked merit. A scrutiny of the judgment of the learned JC, especially at pp 391–404 Vol 4 of the appeal record, revealed that she took exceptional care to consider and judicially appreciate the defence at some length before coming to a definite finding of fact on the very essence of the appellant's defence that the appellant had no knowledge of the drugs concealed in the boot of the taxi. In the words of the learned JC:

> In this case, I do not accept or believe the accused's explanation. Neither does that explanation raise in my mind any reasonable doubt as to the accused's guilt.

[23] In our judgment, the learned JC directed herself quite rightly along the approach indicated in *Mat v Public Prosecutor* [1963] MLJ 263 and *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073. The learned JC had done all that was required of her by the law. We are also of the view that the complaint by learned counsel for the appellant here really turns upon a question based upon the credibility of the witnesses, including the appellant himself and the inherent probabilities of their testimonies. We have to remind ourselves that as a trier of fact, the learned JC had the audio visual advantage reserved to a trial judge. An appellate court would be slow to disturb a trial court's finding of facts in the absence of any perverse and unwarranted finding on the totality of the evidence before it (see *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2008] 5 CLJ 186). It has not been shown that the findings of the learned JC is against the weight of evidence or perverse in any way. The judgment of the learned JC does not contain any serious error warranting appellate interference.

[24] We found the conviction of the appellant safe. We had, therefore, dismissed the appeal. We affirmed the conviction and the sentence of death imposed by the learned JC upon the appellant.

Appeals dismissed and decisions of the High Court affirmed.

Reported by Ashok Kumar